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IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,
Petitioners,

—v.—

GROKSTER, LTD., *ET AL.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* BRIDGEMAR SERVICES, LTD. D/B/A IMESH.COM IN SUPPORT OF NEITHER PARTY

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Bridgemar Services, Ltd. d/b/a iMesh ("iMesh") respectfully submits this brief as *amicus curiae*. This brief is not offered in support of either party on this appeal.[1] Rather, it provides information about the feasibility of integrating digital fingerprinting and copyright filtering technology on a distributed P2P network in order to eliminate unauthorized file sharing.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

iMesh is the oldest existing distributor of peer-to-peer ("P2P") file sharing software, having begun distributing its software just weeks after the original Napster launch. While the original Napster is no longer in the business of distributing P2P file sharing software, iMesh continues to be a leading P2P software distributor. Its current software functions almost identically to that of the Respondents in this case.[2] The most recent iteration of the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief are on file with the Clerk of the Court.

[2] The major United States record labels (the "Record Companies"), the vast majority of which are also Petitioners in this case, sued iMesh in the United States District Court for the Southern District of New York, in the case *Motown Record Company, L.P., et al. v. iMesh.com, Inc. et al.*, No. 03 CV 7339 (S.D.N.Y. 2003) (cited hereafter as the "iMesh Action") in September 2003. In the iMesh Action the Record Companies sought to hold iMesh liable for the infringements of its users based upon the same secondary liability theories advanced in the case at bar. The iMesh Action was ultimately settled and discontinued in July 2004 pursuant to a consent judgment. Neither the consent judgment nor any other agreement between iMesh and the Record Companies requires iMesh to submit this brief, or take any position at all in this case.

iMesh software provides its users with access to the FastTrack and Gnutella networks, the same networks that Grokster and Streamcast users, respectively, access.

iMesh, however, is currently in the process of converting its business model. The new business model will be a commercial model that will offer digitized mainstream music, and ultimately video, on a P2P network pursuant to licenses from copyright holders. Under its new commercial model, iMesh intends to integrate existing digital fingerprinting and copyright filtering technology in order to prevent users from unlawfully distributing and/or reproducing copyrighted content that has not been licensed.

By converting its business model, iMesh will use P2P technology for the non-infringing commercial purpose of allowing users of its software to legally share authorized copyrighted works and public domain works. Toward that end, iMesh has taken significant steps toward becoming the first distributor of P2P file sharing software that incorporates and implements existing digital fingerprinting and filtering technology. Prior to launching this new commercial product, iMesh will obtain licenses from the relevant copyright owners for the distribution of their copyrighted works.

SUMMARY OF THE ARGUMENT

There is presently no technological barrier to implementing an effective copyright filtering mechanism on distributed P2P networks such as the FastTrack and Gnutella networks to prevent users from unlawfully distributing and/or reproducing copyrighted content without authorization from, and fair compensation to, the copyright holders. To the contrary, such technology currently exists. iMesh itself has thoroughly evaluated

copyright filtering mechanisms for use in P2P networks, including the very same P2P networks currently accessed by the Respondents' users. By integrating existing digital fingerprinting and copyright filtering technology into their software, P2P companies can readily prevent users from unlawfully exchanging unauthorized copyrighted content. Moreover, implementation of such a digital fingerprinting and filtering mechanism in no way changes the nature of the underlying P2P technology or vitiates the efficiencies that such P2P technology conveys to users and businesses that use it. Rather, integration of copyright filtering technology simply prevents users of P2P products from reproducing or distributing copyrighted content that the copyright holders have not authorized for such reproduction or distribution. All other uses of the P2P -- network including for sharing authorized or public domain content -- remain intact.

Furthermore, the deployment of such technology is integral to the creation of a legitimate on-line market for the sale and distribution of copyrighted content over P2P networks -- a market that provides users access to the most popular content they want and that provides fair compensation to content owners and rights holders. Integrating digital fingerprinting and filtering technology into P2P networks is also necessary to create the economic incentives for companies such as iMesh to invest in technological innovation that ultimately creates consumer benefits and drives a significant sector of the nation's economy.

ARGUMENT

I. P2P Network Architecture And The Requirements For The Development Of A Legitimate Commercial Market For Sharing of Copyrighted Content Over The Internet

P2P networks come in various shapes and sizes. In essence, they reflect the continued devolution of centralized computing and a change in the manner in which end users obtain information over the Internet. Instead of searching out a central website for information, over a P2P network, an end user can obtain access to information directly from other users' computers. "In a nutshell, p2p is characterized by direct access between peer computers, rather than through a centralized server."[3]

P2P is an underlying technology on which many different types of user applications can be built. File trading applications such as iMesh's and Respondents are one example of an end user application built on the foundation of P2P technology. Many users are sharing copyrighted music and video files without the authorization of content owners. This file sharing "black market" stands as an effective barrier to the development of a legitimate on-line market for music, video, gaming and other content as well as a barrier to technological innovation.

The current file sharing environment can be characterized as utter chaos for content owners, rights holders, creators and artists. Every time a copyrighted work is

[3] S. Androutsellis-Theotokis, *A Survey of Peer-To-Peer File Sharing Technologies*, Athens Univ. of Econ. & Bus. (2002) Available at: *http://www.dmst.aueb.gr/dds/pubs/jrnl/2004-ACMCS-p2p/html/AS04.html. See also Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*, 380 F.3d 1154, 1158 (9th Cir. 2004) ("*Grokster II*").

digitally copied and transferred over P2P file sharing networks, the copyright owners' distribution and reproduction rights are infringed.[4] The rules that have governed the physical world for nearly a century have given way to anarchy over the Internet.

Out of this anarchy, however, can come a legitimate market where technology is deployed so as to create a set of digital rules that will allow users to access the full range of content they choose over P2P file sharing networks while licenses are sought from the appropriate rights and such copyright holders are properly compensated for their works. Currently, while the technology exists, few mechanisms to track sales, transfers, reproduction or distribution of digital content over P2P networks have been incorporated into such networks. In the physical world, the sale of a CD or DVD at retail gives rise to upstream compensation to the retail distributor, the wholesaler, the music label or movie studio (as the case may be), artists and musicians and the holders of residual rights.

A functioning economic market similar to the physical goods world can be created in the P2P world where the P2P networks integrate technology that can identify the copyrighted content files that are being transferred, filter out content files that are not authorized for P2P distribution, and track legitimate file transfers for retail and wholesale payment purposes as well as royalty distribution to artists and performing rights organizations.

[4] *See, e.g., A & M Records, Inc. v. Napster*, 239 F.3d 1004, 1014 (9th Cir. 2001) (". . . Napster users infringe at least two of the copyright holders' exclusive rights: the rights of reproduction, §106(1); and the distribution, [ ] §106(3). Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights. Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights.")

Such a market would also provide incentives to companies such as iMesh to invest in technological innovation. iMesh believes this market will develop, and hence is investing in the necessary technology in order create consumer choices and new services for Internet content commerce.

The converse, of course, is also true. If copyrighted content continues to be available for free without restrictions over P2P networks, it may well present a Sisyphean task for P2P companies such as iMesh to create legitimate commercial systems. No matter how much companies like iMesh invest in marketing, innovative technology and branding, the boulder will likely roll back down to the bottom of the hill.

II. Effective Technology Exists To Prevent Infringing Activity On A Distributed P2P Network[5] Without Changing The Essential Functions Of The P2P Software

The District Court found that Respondents do not have control over users of their software sufficient to prevent users' infringing activity. *Metro-Goldwin-Mayer Studios, Inc. v. Grokster, Ltd*, 259 F. Supp. 2d 1029, 1045 (C.D. Calif. 2003) ("*Grokster I*"). In rendering its decision, the Ninth Circuit relied on that finding. *Grokster II*, 380 F. 3d at 1165 ("It is also clear that none of the communication between defendants and users provides a point of access for filtering or searching for infringing files . . ."). In fact, the technology does exist to prevent infringement on distributed P2P networks. iMesh has

[5] In a distributed P2P network, such as Gnutella or FastTrack, a centralized server is not required for file trading properly to function. However, central servers are often used to support the business model of P2P networks, including for advertisements and other revenue generating activities.

thoroughly evaluated digital fingerprinting and filtering technology for use on the very same networks (FastTrack and Gnutella) utilized by users of Respondents' software and there is no question that the technology exists successfully to prevent infringement on these networks without otherwise affecting the essential functionality of the P2P software.

A. How Digital Fingerprinting and Filtering Technologies Work

Copyright filtering technology uses a system of audio recognition software that classifies sound based on its perceptual characteristics. This technology relies upon mathematic measurements that accurately characterize and model audio content.

The analysis performed on a song or movie file by this technology produces a set of numeric values -- a "digital fingerprint." This digital fingerprint is absolutely unique to a particular master recording of a song or movie soundtrack. In essence, each digital fingerprint identifies a master recording, much as a human fingerprint identifies a person. The digital fingerprints generated by the software are accurate enough to distinguish between different versions of a single song.

B. How These Technologies Work On A Distributed P2P Network

Copyright filtering technology is fairly straight forward in concept and implementation. Conceptually, it blocks unauthorized download and upload attempts by using a digital fingerprinting and filtering technology. When a user attempts to download an audio digital file the copyright filtering software creates a digital fingerprint of the content of that file. The fingerprint is sent to an identification server where it is compared against

a reference database of copyrighted works not authorized for distribution.[6] The identification server searches its database to determine whether the digital fingerprint matches any portion of any of the files contained in its database of protected works. If the work is shown to not be authorized for distribution, then the client immediately cancels the download. This entire process takes only a few seconds. It does not adversely affect the essential functionality of the P2P software. Conceptually, the process works in a similar manner for uploads.

iMesh's evaluation and testing to date has confirmed that P2P software that runs on fully distributed P2P networks can incorporate digital fingerprinting and copyright filtering technologies.[7] With the security of this technology integrated in P2P software such as iMesh's, a legitimate marketplace can be created in which P2P networks offer downloads to customers under license from content owners or their agents. Moreover, because the database of protected works would not contain public domain works, or the works of copyright holders who want their content freely distributed on file sharing networks, these types of works would pass through the system to end users searching for them without restriction.

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[6] The simplest implementation is to house the reference database in a central server. However, the reference database could also be distributed in the software application in the same manner that file indexes are currently distributed on decentralized P2P networks.

[7] Like Grokster in the present case, iMesh does not have access to the source code for the FastTrack network. Yet based on iMesh's evaluation of this technology, inability to access the FastTrack source code would not prevent a P2P company from successfully filtering on the FastTrack network.

CONCLUSION

For the foregoing reasons, iMesh respectfully requests that, in rendering its decision, this Court take into consideration that the technology exists to integrate digital fingerprinting and filtering technologies into P2P network software. The implementation of this technology on P2P networks will prevent copyright infringement through illegal downloading and file sharing, while preserving the ability of such networks to distribute authorized and public domain works. At the same time, it will facilitate the development of a legitimate marketplace in which consumers have access to licensed content for downloading and sharing and in which content owners can be compensated for the use of their copyrighted works.

Respectfully submitted,

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